88-448

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CARL LEROY WILLIAMS
Petitioner,

v.

THE STATE OF GEORGIA
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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QUESTION PRESENTED:

Whether the opening argument the State of Georgia presented, and the direct testimony and documentary evidence admitted at petitioner's trial which disclosed, commented upon, and emphasized to the jury that petitioner had invoked his constitutional rights to remain silent and consult with an attorney was error in violation of petitioner's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution requiring reversal of petitioner's conviction?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. _____

CARL LEROY WILLIAMS
Petitioner,

v.

THE STATE OF GEORGIA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

Petitioner Carl Williams respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered in this proceeding on July 14, 1988.

OPINIONS BELOW

The Supreme Court of Georgia denied the defendant's petition for a writ of certiorari. (App. 1a). The opinion of the Court of Appeals of Georgia (App. 2a-8a) is unpublished.

JURISDICTION

(1) The Supreme Court of Georgia denied the defendant's petition for a writ of certiorari on July 14, 1988. (App. 1a). It is final by its terms.

(2) The federal questions were raised as indicated at pp. 3-7, infra. The excerpts from the record showing the raising of the federal questions are set out in the Appendix at pages 9a-50a.

(3) The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

U. S. Constitution Amendment 5
U. S. Constitution Amendment 6
U. S. Constitution Amendment 14
These provisions are set forth at App. 51a.

STATEMENT OF THE CASE

In the early morning hours of October 22, 1986, Carl Williams was stopped for speeding in Whitfield County by Georgia State Trooper Mickey Little. Trooper Little obtained consent to search the rental van which Mr. Williams was driving and discovered one kilogram of cocaine and small amounts of marijuana. Trooper Little placed Mr. Williams under arrest, read

him his *Miranda* rights, and transported him to the Whitfield County Sheriff's Department. Mr. Williams was then placed in the lockup area of the Whitfield County Correctional Center.

Later in the morning, Mr. Williams was brought to an interview room in the detective section of the Sheriff's Department. Present in that room were Trooper Little, Captain Ricky Swiney of the sheriff's Department, and Agent Wayne Sturdivan of the Federal Bureau of Investigation. Captain Swiney had a form he referred to as a standard *Miranda* rights form. Using this form he again advised Mr. Williams of his constitutional rights. Captain Swiney asked Mr. Williams "if he would like to sign and talk to us about this." (App. 38a). On the form one of the officers noted that Mr. Williams had "refused and requested an attorney." (App. 54a). The officers terminated the interrogation and got up to leave the room. As they were leaving, Mr. Williams made several spontaneous statements. They informed Mr. Williams that after he consulted with his attorney, if he still wished to speak with them, they would be available. The defendant was later indicted for three offenses: (1) trafficking cocaine; (2) speeding; and (3) possession of marijuana.

Superior Court, Whitfield County, Georgia

On March 19, 1987, the State of Georgia requested a hearing in accordance with *Jackson v. Denno*, 378 U.S. 368 (1964), to determine if the defendant's spontaneous statements made on October 22, 1986, were voluntary and admissible as evidence. The State presented two witnesses during this hearing. Defense counsel did not offer any proof or contest the voluntariness of these statements at any time. The trial judge found the defendant "was advised of his *Miranda* rights; he understood them; he

exercised his rights and asked for an attorney; that any interrogation or question ceased, but thereafter he made some spontaneous statements." (App. 10a).

The trial began immediately following the *Jackson-Denno* hearing. During his opening argument the Assistant District Attorney, Mr. Lee Taylor, commented on the fact that Mr. Williams had been advised upon arrest that he had several constitutional rights. Mr. Taylor went on to list those rights and eventually said, "The defendant understood those rights; in fact, he invoked his rights to an attorney. He said, 'I'd like to talk to an attorney.'" (App. 12a). Mr. Robert W. Ritchie, counsel for Mr. Williams, immediately requested a bench conference. Defense counsel moved for mistrial on the grounds that the prosecutor had improperly commented on the defendant's request for counsel. The Court overruled the motion, citing the case of *Edwards v. Arizona*, 451 U.S. 477 (1981) as authority. (See App. 12a-13a)(See also App. 52a).

Trooper Mickey Little was called as a witness by the State during the presentation of their case-in-chief. The prosecutor asked Trooper Little if the defendant had been advised of his *Miranda* rights. Little answered that the defendant had been informed of his rights and appeared to understand them. Little then went on to discuss the spontaneous statements made by the defendant. The prosecutor then asked the witness to go back to the beginning of the conversation and recall if "after the defendant was advised that he had certain constitutional rights, one of them being the right to a lawyer, did he exercise any of those rights?" Trooper Little responded, "Yes sir, he did request a lawyer be present." Defense counsel again moved for a mistrial and objected to the prosecutor's repeated efforts to place the defendant's request for counsel

before the jury. The Court again overruled the objection and motion but noted a continuing objection by the defense to this line of questioning. (App. 13a-14a). During the remainder of this witnesses' testimony, the prosecutor and the witness made several additional references to the defendant's exercise of his Sixth Amendment right to counsel. (App. 14a-15a).

The trial continued on March 20, 1987, and before the jury returned on this second day, the defense renewed their motion for a mistrial. Defense counsel was allowed to make a detailed argument, supported by case law, as to why the motion should be granted. The Judge took the motion under advisement. (App. 15a-21a).

The prosecutor planned to offer the *Miranda* rights waiver form as an exhibit. Therefore, just before the noon recess on the second day, he sought direction from the Court as to whether the notation on the form that the defendant refused to sign the form and requested an attorney should be deleted before the State offered the exhibit. Defense counsel strongly objected to the admission of this exhibit as an unconstitutional comment by the State on the defendant's right to remain silent, protected by the Fifth Amendment, and as an unconstitutional comment on the defendant's request for counsel, protected under the Sixth Amendment. Defense counsel explained at great length his basis for the objection to this line of testimony. He further explained to the Court the defense position that: (1) irreversible prejudice to the defendant had occurred by the impermissible comments on the defendant's partial silence and request for counsel; (2) such comments often create a strong inference of guilt in the mind of jury members; and (3) any jury instructions on this issue would simply exacerbate the prejudice already sustained. Defense

counsel finally reminded the Court that the defendant had never challenged the issues of voluntariness and would be willing to stipulate to the voluntary nature of the petitioner's spontaneous statements. (App. 22a-32a)(See also App. 39a).

The Court discussed with the prosecutor two possible courses of action to deal with the defense's objections and motion for new trial. The State initially favored the course which would discontinue the comments on defendant's assertion of his constitutional rights. The Court pointed out that "changing horses in the middle of the stream" left the problem of the prosecutor's comments during his opening statement. The State and the Court then agreed that it was best to continue on without removing the issue of voluntariness from the jury. (App. 28a-30a). The Court ruled that the *Miranda* rights waiver form would be allowed into evidence and the question of voluntariness would be submitted to the jury. (App. 33a-34a).

The State's final witness, Captain Rick Swiney, was allowed to testify about the circumstances surrounding the completion of the rights waiver form. After the prosecutor asked him "What was the next thing that happened as far as your conversation is concerned?" Captain Swiney responded, "He requested an attorney." (App. 38a).

Since the defense did not have any witnesses or evidence to submit, the Court charged the jury at the completion of the State's case. The Court, over defense objections, charged the jury on the question of voluntariness. The Court's charge contained numerous references to a defendant who has exercised his constitutional rights (App. 41a-44a). During jury deliberations, the jury twice returned requesting additional guidance on the trafficking charge and the

lesser included offense of simple possession. After deliberating, the jury found the petitioner guilty as charged.

Georgia Court of Appeals

On appeal, the defendant asserted that his constitutional rights had been infringed upon by the impermissible comments by the prosecutor, by the State's witnesses, and the introduction of the rights waiver form. The defendant argued to the Georgia Court of Appeals that these comments violated his Fifth Amendment, Sixth Amendment, and Fourteenth Amendment rights guaranteed to all citizens by the United States Constitution. The Court of Appeals recognized "that the State emphasized to the jury the fact that the appellant had requested an attorney upon being informed of his *Miranda* rights ...". (App. 7a). However, the Court held that the defendant's subsequent spontaneous statements, which the State had introduced, presented a question of voluntariness for the jury, and the trial courts instructions were sufficient to focus the jury on the proper use of the contested testimony.

Georgia Supreme Court

The defendant filed a petition for Writ of Certiorari with the Georgia Supreme Court alleging the same constitutional violations argued at the Court of Appeals. The Georgia Supreme Court declined to issue the Writ of Certiorari. (App. 1a).

REASON FOR GRANTING THE WRIT

THE OPENING ARGUMENT THE STATE OF GEORGIA PRESENTED, AND THE DIRECT TESTIMONY AND DOCUMENTARY EVIDENCE

ADMITTED AT PETITIONER'S TRIAL WHICH DISCLOSED, COMMENTED UPON, AND EMPHASIZED TO THE JURY THAT PETITIONER HAD INVOKED HIS CONSTITUTIONAL RIGHTS TO REMAIN SILENT AND CONSULT WITH AN ATTORNEY WAS ERROR IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRING REVERSAL OF PETITIONER'S CONVICTION.

I. Introduction.

The testimony and argument in the petitioner's trial lasted less than eight hours. During this short trial the prosecutor continually brought to the jury's attention that the petitioner, after receiving his *Miranda* rights, had refused to speak with the police and had requested to talk with an attorney. The prosecutor used every opportunity to keep these issues in front of the jury. He included the prejudicial comments in his opening statement, then he twice elicited the testimony during direct examination, and finally introduced the unsigned, rights waiver form as evidence. The content, frequency, and tone of these impermissible comments were designed to create an impression in the jurors' minds that the petitioner must have been guilty or he would have cooperated fully with the police.

At the heart of the prosecutor's repeated references to petitioner's invocation of his constitutional rights are several short exculpatory statements petitioner made after the police interrogation had been terminated. At the conclusion of the state-initiated *Jackson-Denno* hearing, the trial court ruled that these statements were made after

any interrogation had ceased, were spontaneous, and could be put in evidence. The petitioner has never challenged the voluntariness or admissibility of these statements. During trial, petitioner's counsel offered to stipulate that the statements were voluntary and therefore admissible. In spite of the fact that it was obviously unnecessary for the jury to decide whether these statements were voluntarily made, the court allowed the prosecutor to proceed with his impermissible references to petitioner's invocation of his constitutional rights for the purported purpose of bringing the voluntariness issue before the jury. Thus the jury was inundated with continuing references to the fact that petitioner had invoked his Fifth Amendment right to remain silent and his Sixth Amendment right to counsel.

Petitioner therefore paid an intolerably high price for exercising his fundamental constitutional rights. For the following reasons, this Court should exercise its discretion to review petitioner's conviction and vindicate the rights guaranteed petitioner by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

II. The Argument and Evidence Disclosing and Emphasizing Petitioner's Invocation Of His Right To Counsel Was Violative of the Sixth Amendment and Is Grounds for Reversal of Petitioner's Conviction.

This Court has not had an opportunity to decide what use, if any, a prosecutor may make of a defendant's post-arrest, post-*Miranda* request for

counsel.[1] However, the interdependence of the Fifth Amendment right to remain silent and the Sixth Amendment right to counsel was recognized in *Miranda v. Arizona*, 384 U.S. 436, 469 (1966), when this Court held:

> ... the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.

As a result of this interdependence, the Sixth Amendment right to counsel is a significant portion of what is now commonly referred to as the *Miranda* rights. The use of post-arrest, post-*Miranda* silence by a prosecutor, against a criminal defendant, has been closely scrutinized by this Court. Several significant decisions, such as *Doyle v. Ohio*, 426 U.S. 610 (1976)

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[1] *But see, Wainwright v. Greenfield*, 106 S.Ct. 634 (1986), where a defendant's silence and request for counsel had been introduced by a state prosecutor to counter a plea of not guilty by reason of insanity. The Court held that the "evidentiary use of an individual's exercise of his constitutional rights" was impermissible "after the State's assurance that the invocation of these rights will not be penalized." 106 S.Ct. at 641. Justice Rehniquist, writing separately, draws a distinction between when the request for counsel is offered on the question of sanity as compared to an offer on the question of guilt or innocence. He finds the request for counsel highly relevant to the question of sanity but when the issue is guilt or innocence he finds the request for counsel "insolubly ambiguous" similar to the holdings in *Doyle v. Ohio*, 426 U.S. 610 (1976), 106 S.Ct. at 642.

and *United States v. Hale*, 422 U.S. 171 (1975), have held that most uses of a defendant's silence are fundamentally unfair and therefore violative of the Due Process Clause of the Fourteenth Amendment. The attempt to find meaning in the defendant's silence, after the receipt of the *Miranda* warnings, has been rejected by this Court noting that "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Doyle*, 426 U.S. at 617. While the use of a defendant's silence has received extensive review by this Court in *Doyle* and its progeny, the Sixth Amendment right to counsel has only received similar treatment at the circuit court level.

"Lower federal courts have extended the Supreme Court's reasoning in *Doyle* to an arrestee's request to secure counsel. The right to counsel is included in the *Miranda* warnings, and as such is covered by the implicit assurance that invocation of the right will carry no penalty." *United States v. Daoud*, 741 F.2d 478, 480 (1st Cir. 1984).[2] The various courts

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[2]*See United States v. McDonald*, 620 F.2d 559, 564 (5th Cir. 1980) ("Obvious and insidious attacks on the exercise of this constitutional right [sixth amendment right to counsel] are antithetical to the concept of a fair trial and are reversible error."); *United States v. Williams*, 556 F.2d 65, 67 (D.C. Cir. 1977) ("Testimony about the desire or request for a lawyer is impermissible."); *United States Ex Rel. Macon v. Yeager*, 476 F.2d 613 (3d Cir. 1973) (Prosecutor's comment on defendant's phone call to counsel was constitutional error.); *Fagundes v. United States*, 340 F.2d 673, 677 (1st Cir. 1965) ("His assertion of one constitutional right, his right to counsel, and his reliance upon another constitutional

of appeal have recognized that comments on a defendant's request for counsel were constitutional error but have not automatically reversed on those grounds. These courts have,

> [L]ooked at all the circumstances under which the disclosure was made in order to determine how seriously in the eyes of the jury it may have penalized defendant's exercise of his right to counsel.
>
> . . .
>
> Reversal has been ordered, however, when the prosecution has deliberately sought to capitalize on a request for counsel, ...

Id., at 480.[3]

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right, his right to remain silent when charged with crime, we think cannot be used against him substantively as an admission of guilt, for to do so would render the constitutional rights mere empty formalities devoid of practical substance."); *Zemina v. Solem*, 438 F.Supp. 455, 466 (D.S.D. 1977) ("The prosecution should not be allowed to imply that only guilty people contact their attorneys.").

[3] *See also United States v. Johnson*, 558 F.2d 1225 (5th Cir. 1977) (equating a defendant's request for counsel to a desire to remain silent; then applying the standards developed in *Doyle* and *Hale*); *Alderman v. Austin*, 695 F.2d 124 (5th Cir. 1983) (Single, unplanned comment found to be "harmless beyond a reasonable doubt."); *Baker v. United States*, 357 F.2d 11 (5th Cir. 1966) (testimony about defendant's request for counsel which was deliberately presented was reversible error.).

This Court has developed a clear standard of review when constitutional error is involved. In *Fahy v. Connecticut*, 375 U.S. 85 (1963), this Court questioned whether the admission of unconstitutionally obtained evidence was harmless error. The Court said, "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." This approach for deciding whether error is harmless was later endorsed by the opinion in *Chapman v. California*, 386 U.S. 18 (1967). This Court has placed the burden upon the prosecution to show that the constitutional error complained of is harmless beyond a reasonable doubt. The *Chapman* "harmless beyond a reasonable doubt" analysis has been consistently applied to the Fifth Amendment violations found in *Doyle* and its progeny.[4]

The harmless error analysis used by the circuit courts of appeal appears to be less stringent than the *Chapman* inquiry. *See e.g., Dauod*, 741 F.2d at 480. Petitioner contends that the *Chapman* test is appropriately applied to the issue at hand. None the less, under either analysis, the prosecutor's actions constitute reversible error.

A review of the record in this case presents four separate incidents where the prosecutor presented evidence of the petitioner's request for counsel. The

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[4]*See e.g., United States v. Elkins*, 774 F.2d 530 (1st Cir. 1985); *Hawkins v. LeFevre*, 758 F.2d 866 (2d Cir. 1985); *United States v. Barton*, 731 F.2d 669 (10th Cir. 1984); *Alderman v. Austin*, 695 F.2d 124 (5th Cir. 1983); *Williams v. Zahradnick*, 632 F.2d 353 (4th Cir. 1980); and *United States v. Edwards*, 576 F.2d 1152 (5th Cir. 1970).

first comment is made by the prosecutor during his opening statement. (App. 12a). An impermissible comment during an opening statement is more egregious than a similar comment at any other time,[5] since it allows the prosecutor to poison the minds of the jurors from the very beginning. The second reference was during the prosecutor's direct examination of Trooper Little. In his testimony, Trooper Little attempted to describe his interview of the petitioner without specifically commenting on the petitioner's request for counsel or refusal to answer questions.[6] The prosecutor stopped Trooper Little and asked him to back up and discuss whether the petitioner had requested a lawyer. (App. 13a). The prosecutor again purposefully elicited from a second State witness, Captain Swiney, that the petitioner had exercised his Sixth Amendment rights. (App. 38a). Finally, to insure that the impermissible inference of guilt would accompany the jury into their deliberations, the State offered as an exhibit the rights waiver form

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[5]*See United States v. Johnson*, 767 F.2d 1259, 1274 (8th Cir. 1985) ("That the comment here was made during an opening statement makes it more egregious than a similar remark would be during closing argument.")

[6]In *Wainwright v. Greenfield*, 106 S.Ct. 634, 640 (1986), this Court agreed that testimony should be elicited by "carefully framed questions that avoid any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel." *See also United States v. Williams*, 556 F.2d 65, 67 (D.C. Cir. 1977), which recognized that testimony of witnesses can delete comments about requests for counsel in order to avoid prejudice or unfair inference.

which contained the "insolubly ambiguous" annotation "Refused. Requested Attorney." (App. 54a). The prosecutor's repeated conduct demonstrates that instead of attempting to tread softly in a delicate, constitutionally sensitive, area, the prosecutor bludgeoned the petitioner with the assertion of his constitutional rights.

A natural explanation of the prosecutor's actions is found in the admission of petitioner's spontaneous, exculpatory, statement; Trooper Little testified that petitioner informed him that "he thought it was money ... in box and not cocaine." (App. 13a). If the jury believed this statement they would be more likely to acquit petitioner or at least convict him of the lesser included offense of simple possession.[7] Thus the petitioner's credibility became crucial and it was necessary to attempt to discredit this statement. The only possible way to attack the petitioner's credibility on this point was to also introduce his request for counsel and refusal to sign a rights waiver form. If the prosecutor could introduce these *Miranda* issues early and often they would be sure to raise an inference of guilt in the juror's minds. Attacking the petitioner's credibility in this way struck at the jugular of the petitioner's defense but also crossed the line into unconstitutional conduct by the prosecutor.[8] The Due

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[7]In fact, the jury requested additional instructions on the difference between trafficking and simple possession. (App. 47a).

[8]*See United States Ex Rel. Macon v. Yeager*, 476 F.2d 613 (3d Cir. 1973) (where credibility of petitioner was a central issue and prosecutor's comment on petitioner's consultation with counsel after shooting incident may have caused the jury to disbelieve

Process Clause of the Fourteenth Amendment allows a prosecutor "to strike hard blows [but] he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935).

The State of Georgia has never argued that the prosecutor's actions were harmless but have maintained that under this Court's decision in *Edwards v. Arizona*, 451 U.S. 477 (1981), they were required to bring to the jury's attention the petitioner's request for counsel and refusal to answer questions. The State's reliance on *Edwards* is misplaced. The *Edwards* court was quick to point out that absent an

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petitioner, the Court was unable to conclude that prosecutor's comments were harmless beyond a reasonable doubt.) *Cf.*, *United States v. Hale*, 422 U.S. 171, 180 (1975) ("Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice."); *Velarde v. Shulsen*, 757 F.2d 1093, 1095 (10th Cir. 1985) ("... the importance of the defendant's credibility becomes so significant that prosecutorial error attacking that credibility cannot be harmless beyond a reasonable doubt."); *United States v. Henderson*, 565 F.2d 900, 905 (5th Cir. 1978) ("Even if the prosecutor commented on appellant's silence for the purpose of impeaching his credibility as to his subsequent explanations, we hold that the comments were improper and plain error, because appellant's silence lacked significant probative value on his credibility, and under these circumstances any reference to it carried with it an intolerably prejudicial impact.").

interrogation there would be "no occasion to determine whether there was a valid waiver." *Id.*, at 486. There was no need to inquire into the voluntariness of the petitioner's statements because as *Edwards* holds, "nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at trial." *Id.*, at 485. The *Edwards* decision sought to exclude defendants who made "spontaneous declarations".[9] The argument made by the State of Georgia is strikingly similar to the necessity argument made by the State of Ohio which was rejected in *Doyle*.[10] The Due Process concerns expressed in *Doyle* have been applied by the courts of

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[9] *See Miranda v. Arizona*, 384 U.S. 436, 478 (1966) ("volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."). *United States v. De La Luz Gallegas*, 738 F.2d 378, 381 (10th Cir. 1984) ("the holding in *Edwards* simply prohibits the introduction of statements made by a defendant after invocation of his right to counsel which are in response to law enforcement initiated interrogation or its functional equivalent ... Simply because a suspect has requested an attorney is not itself sufficient to prohibit the use of spontaneous declarations not brought about by the prompting of law enforcement officials."). *See also* Ruling of Judge Pannell at conclusion of *Jackson-Denno* hearing that after "any interrogation or questions ceased, but thereafter he [Petitioner] made some spontaneous statements." (App. 10a).

[10] *See Doyle v. Ohio*, 426 U.S. 610, 616 (1976) ("The State pleads necessity as justification for the prosecutor's action in this case.").

appeal and this Court should apply them with equal force where Sixth Amendment rights are threatened.

The prosecutor's tactics in this case are questionable at best. The State raised the issue of voluntariness and now seeks to justify the violation of fundamental constitutional rights by use of an issue that was never controverted by the petitioner. Even when there is a legitimate issue the State should avoid prejudicial materials through the use of carefully framed questions. A strong and clear statement from this Court that the prosecution's conduct was impermissible and unjustified is necessary to bring meaning to petitioner's constitutional rights and protect these rights for others.

III. The Evidence Disclosing and Emphasizing Petitioner's Invocation of His Right to Remain Silent Was Violative of the Fifth Amendment and Is Grounds for Reversal of Petitioner's Conviction.

One area of constitutional law which has received extensive attention in this Court is the Fifth Amendment right to remain silent. The starting point for any contemporary inquiry into the Fifth Amendment is *Miranda v. Arizona*, 384 U.S. 436 (1966). *Miranda* required that police officers inform any citizen of his fundamental Fifth and Sixth Amendment rights before they conduct a custodial interrogation. The Court later fashioned additional protections for defendants who, relying on their *Miranda* warnings, chose to remain silent.

In *United States v. Hale*, 422 U.S. 171 (1975) and *Doyle v. Ohio*, 426 U.S. 610 (1976), this Court ruled that a defendant's post-arrest, post-*Miranda*

silence could not be used to impeach a defendant at trial when he offered an alibi for the first time. Proof of a defendant's silence was said to lack any significant probative value and had to be excluded in order to comply with the Due Process Clause of the Fourteenth Amendment. Several significant decisions of the lower federal courts have helped to define the limits of the *Doyle* decision.

The Eleventh Circuit has held that the *Doyle* standard is strict and virtually any description of a defendant's silence following arrest and a *Miranda* warning will constitute a *Doyle* violation.[11] Several circuits have found that introduction of an unsigned rights waiver form or testimony that a defendant refused to sign a rights waiver form is a clear infringement of a defendant's privilege against self-incrimination. *See United States v. Jones*, 696 F.2d 479 (7th Cir. 1982); *United States v. Valencia*, 773 F.2d 1037 (9th Cir. 1985); and *United States v. Bridwell*, 583 F.2d 1135 (10th Cir. 1978). The First Circuit has warned that a *Doyle* violation occurs not only when there are explicit references to a defendant's silence but also when the reference is more oblique.[12]

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[11] *See United States v. Rosenthal*, 793 F.2d 1214, 1243 (11th Cir. 1986) and *United States v. Shaw*, 701 F.2d 367, 382 (5th Cir. 1983).

[12] *See United States v. Elkins*, 774 F.2d 530, 537 (1st Cir. 1985) ("A *Doyle* violation occurs not only when the objectionable comments explicitly refer to a defendant's failure to answer questions put to him or her, but when the reference is more oblique. In the latter case the nature of the statement and the context in which it was offered must be examined to determine the presence of error.").

The introduction of the unsigned rights waiver form in this case was an impermissible comment on the petitioner's assertion of a constitutional right after arrest and served no relevant purpose.[13] The State of Georgia has argued, however, that introduction of the form and the corresponding testimony was necessary to prove that the statements were voluntary. This claim was also made by the prosecution in the case of *United States v. Valencia*, 773 F.2d 1037 (9th Cir. 1985).

The Ninth Circuit, in rejecting the government's position that they had to offer testimony about the defendant's refusal to sign a rights waiver form, stated:

> However, when the defendant's subsequent statements are *exculpatory* or *innocuous*, as in Valencia's case, voluntariness is simply not an issue. In such cases, there is nothing to indicate that the defendant's statements were involuntarily made, and the defendant does not oppose their admission into evidence. Thus, testimony concerning the defendant's invocation of *Miranda* rights is not probative, although it is potentially highly prejudicial.

Id., at 1042. Similarly, the petitioner also made several spontaneous, exculpatory statements which he was willing to stipulate were voluntarily made. The prosecutor declined to accept the offered stipulation

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[13] *See United States v. Jones*, 696 F.2d 479 (7th Cir. 1982); *United States v. Valencia*, 773 F.2d 1037 (9th Cir. 1985); and *United States v. Bridwell*, 583 F.2d 1135 (10th Cir. 1978).

and insisted that he be allowed to offer the unsigned rights waiver form and testimony showing that the petitioner had refused to sign the form.

The prosecution has the burden of proving this error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). This burden cannot be met in this case. The magnitude of the error is very great. The prosecutor is not guilty of a single, inadvertent reference to the petitioner's exercise of his constitutional rights. As discussed, the prosecutor repeatedly brought home to the jury that this defendant refused to talk and wanted a lawyer. Nor is this a case in which the judge admonished counsel to avoid potentially prejudicial comments and gave an immediate curative instruction. The judge denied every defense objection and then charged the jury with the instructions which were likely to exacerbate the error already committed.

Thus, the record establishes serious constitutional error in petitioner's trial which cannot be deemed harmless. Accordingly, this Court should exercise its discretion to review petitioner's conviction.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert W. Ritchie
Counsel of Record for
Petitioner Williams
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P. O. Box 1126
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APPENDIX

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta: July 14, 1988

Case No. 45938, Carl Leroy Williams

V. The State C/A # 76587

The Supreme Court today denied the writ of certiorari in this case. All the justices concur, except Bell & Hunt, J. J., not participating.

Very truly yours,

JOLINE B. WILLIAMS,
Clerk

In the Court of Appeals of Georgia.

76587. WILLIAMS v. THE STATE. BA-90.

BANKE, Presiding Judge.

The appellant was stopped by a Georgia State trooper while driving a rented van on I-75 near Dalton, Georgia, and was given a warning ticket for speeding. Thereafter, the trooper conducted a search of the van pursuant to a written consent form signed by the appellant authorizing the search. The search resulted in the seizure of a kilogram of cocaine as well as a quantity of marijuana; and the appellant was subsequently convicted of trafficking in cocaine, possession of marijuana, and speeding. In this appeal from the denial of his motion for new trial, he contends that the trial court erred in denying his motion to suppress the contraband as

(Page 2)

the fruit of an unlawful search and also in allowing the state to bring to the jury's attention the fact that he had invoked his right to counsel following his arrest.

The stop occurred at approximately 3:00 a.m. on October 22, 1986. Although the trooper who made the stop was on routine patrol duty at the time, he had been assigned, as part of a State Patrol program known as "Operation Nighthawk," to concentrate his efforts on interstate highway drug interdiction; and his interest in stopping the van was clearly attributable, at lest in part, to his observation of information appearing on its license plate indicating that it was a rental vehicle from the Miami, Florida, metropolitan area. The trooper was in fact accompanied at the time of the arrest by a reporter from USA Today, who was riding in the patrol car with the consent of the State Patrol for the express

purpose of obtaining information for an article on interstate highway

(Page 3)

drug arrests.

After stopping the van and speaking briefly with the appellant, the trooper spoke with a passenger seated in the front seat. At this time, the trooper "smelled an odor of burnt marijuana coming from inside the vehicle" and observed, from the passenger's glazed physical appearance and the slowness of his responses, that he seemed to be "under the influence of some intoxicant." Also, the trooper observed that the passenger was making an apparent effort to conceal a brown box located under his seat and further noted, upon questioning him, that some of his responses concerning the nature of his trip appeared inconsistent with those previously elicited from the appellant on the subject. The trooper then issued the appellant a warning ticket for speeding and asked him to consent in writing to a search of the vehicle. Following a brief discussion with the appellant concerning his alternatives in this

(Page 4)

regard, which was recorded on tape via a remote microphone being worn by the trooper, the appellant executed the consent form. During the ensuing search of the vehicle, marijuana was discovered inside the brown box which the trooper had previously noticed under the passenger's seat, and cocaine was discovered inside a cardboard box bearing the appellant's name located in the rear of the van. Held:

1. The appellant contends that the initial detention of the van was unlawful because the speeding violation was utilized as a mere pretext for the

trooper's actual intention, which, from the outset, was to conduct a search for drugs. It may indeed be inferred from the evidence presented at the hearing on the motion to suppress that the trooper would not have stopped the van for speeding but for his suspicion that it might be transporting illicit drugs. However, it is further apparent that the trooper formed the

(Page 5)

belief that the van was exceeding the speed limit immediately upon his initial observance of it and that he proceeded forthwith to confirm this belief by clocking it with his patrol car. Thus, there is no question that the trooper was relying at all times on the speeding violation as his authorization for making the stop. The trial judge concluded that under such circumstances the trooper's conduct could not be considered violative of the Fourth Amendment merely because he had been influenced by his "acute awareness for drug courier activities." We agree. A rule requiring a law enforcement officer to forego making a traffic stop which he would otherwise be authorized to make merely because he suspects that the vehicle might be engaged in the transport of illicit drugs would have little to commend it, and we have previously declined the invitation to create such a rule. See Coop v. State, ___ Ga. App. __ (Case No. 75463, decided 3/11/88);

(Page 6)

Eisenberger v. State, 177 Ga. App. 673 (340 SE2d 232) (1986).

The appellant relies upon United States v. Smith, 799 F2d 704, 709 (11th Cir. 1986), for the proposition that a search will be considered unreasonably pretextual unless "a reasonable officer would have made the stop in the absence of the invalid purpose."

The stop at issue in Smith was not predicated on an observed traffic violation, as was the stop in this case, but on "inarticulate hunches" arising from completely lawful activity. Specifically, the defendants in that case were stopped because they "matched a few nondistinguishing characteristics contained on a drug courier profile," and because the driver had avoided looking at the trooper upon passing him. While the trooper testified that he had observed the appellants' vehicle "weaving" after he began following it, he acknowledged that he had, by that time, already decided to make an investigative

(Page 7)

stop of the vehicle, Id. at 706; and the Court specifically held that he did not have probable cause to stop the car for any traffic violation. Id. at 708.

We find nothing in the Smith decision which would suggest that an officer is precluded from stopping a vehicle for an observed traffic violation if he is motivated by a suspicion, itself insufficient to justify an investigatory stop, that the vehicle might be transporting drugs. In fact, the Court emphasized in Smith that the officer's actual state of mind was irrelevant to the legality of the stop, holding that such an assessment must always be based on objective criteria. Id. at 709.

It being undisputed in the present case that the stop of the appellant's vehicle was predicated on an actual, observed speeding violation, we hold that the trial court did not err in concluding that the stop was lawful.

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2. The appellant further contends that even if the initial stop was lawful the search was not, because

the trooper induced him to sign the consent form by deceiving him as to the scope and intensity of the proposed search. As previously indicated, the discussion between the appellant and the trooper which preceded the signing of the consent form was recorded on tape, so there is no question about what actually transpired. Although the trooper initially told the appellant that he merely wanted "to look in the van real quick," he then proceeded to read the consent form to the appellant, and the form unambiguously authorized a "complete search" of the vehicle and its contents. Evidently understanding this, the appellant thereupon expressed reservations about signing the form and asked what would happen if he refused. The trooper responded that in such an event he would attempt to obtain a search warrant, adding that "it would take me a few minutes to see

(Page 9)

whether or not I can obtain one." The trooper repeatedly assured the appellant that he was not required to sign the form; and, indeed, his last words to the appellant before the appellant signed were, "You don't have to but I'd appreciate it." On the basis of this conversation, the trial court was quite clearly authorized to conclude that the appellant had consented to the search freely and voluntarily and that he had not been induced to sign the form by the use of coercion, duress, or deception. Accord Fuller v. State, 165 Ga. App. 55 (1) (299 SE2d 397) (1983); Jones v. State, 154 Ga. App. 21 (1) (267 SE2d 323) (1980).

We additionally note that the trial court did not uphold the search solely on the ground that it was consensual but further concluded that the trooper already had probable cause to conduct a search of the vehicle at the time the consent was given, "because of

the smell of marijuana connected with the other characteristics observed

(Page 10)

and the totality of the circumstances." Based on the trooper's perception of the passenger's physical appearance, the passenger's furtive conduct with respect to the brown box, and the inconsistencies between the passenger's responses and those the appellant had given concerning the nature of their trip, we concluded that this assessment was correct. Accord Brooker v. State, 164 Ga. App. 775 (1) (298 SE2d 48) (1982); Holmes v. State, 163 Ga. App. 753 (294 SE2d 719((1982). Accordingly, we hold that the trial court did not err in denying the appellant's motion to suppress.

3. While it is true that the state emphasized to the jury the fact that the appellant had requested an attorney upon being informed of his Miranda rights, it was shown that the appellant had thereafter made certain spontaneous statements which could be viewed as incriminatory. The state's introduction of these statements into evidence necessarily brought into question the

(Page 11)

issue of their voluntariness, with the result that the circumstances under which they were made became a proper subject for the jury's consideration. Cf. Edwards v. Arizona, 451 U.S. 476 (101 SC 1880, 6 LE2d 984) (1981). At the conclusion of the trial, the jury was specifically charged that the appellant's invocation of his right to talk with an attorney was pertinent solely to the issue of the voluntariness of any statements he might have made while he was in custody and could not be considered as evidence of his guilt or innocence.

Consequently, we find the appellant's final enumeration of error also to be without merit.

Judgment affirmed. Birdsong, C. J., and Beasley, J., concur.

EXCERPTS FROM JACKSON/DENNO HEARING
& TRIAL BEFORE A JURY

IN THE SUPERIOR COURT FOR THE
COUNTY OF WHITFIELD
STATE OF GEORGIA

STATE OF GEORGIA	: INDICTMENT NO.
VS:	: 21,893
CARL LEROY WILLIAMS,	:
Defendant	:

TRIAL BEFORE A JURY
March 19, 20, 1987

HON. CHARLES A. PANNELL, JR.
JUDGE SUPERIOR COURT
CONASAUGA JUDICIAL CIRCUIT
PRESIDING

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* * *

Transcript

* * *

VOLUME III

PAGES: 481 through 776

JACKSON/DENNO HEARING

(Page 520, Original Transcript)

MR. RITCHIE: Page number, please?
MR. TAYLOR: 192.
MR. RITCHIE: On Page 192?
THE COURT: Any argument you want to make, Mr. Ritchie?
MR. RITCHIE: Your Honor, we would simply point out to the Court that the Court has heard extensive proof on the nature of the stop. We would suggest to the Court that this statement is tainted by the illegal stop made by Trooper Little on the highway of October 22nd, 1985, (sic) and that that taint has not been purged prior to the making of this statement. And on that basis, it should be suppressed.
THE COURT: Okay, I understand that. I've ruled against your Motion to Suppress, however, if you're correct on that, I think you're correct on this. The -- I'll find on this hearing that he was advised of his Miranda Rights; he understood them; he exercised his rights and asked for an attorney; that any interrogation or questions ceased, but thereafter he made some spontaneous statements. We've heard from the two officers,

(Page 521, Original Transcript)

and I'll allow those to be put in evidence. What else before I bring the Jury around?
(NO RESPONSE BY COUNSEL)
THE COURT: All right, I'm going to take about five minutes. If you-all want to use the rest room, now is the time.
(WHEREUPON, END OF JACKSON/DENNO HEARING)
(R E C E S S - 2:10 - 2:20, P.M.)

(WHEREUPON, THE JURORS ENTER THE COURTROOM AND THE FOLLOWING CONDUCTED FOR THE HEARING OF THE JURORS, TO-WIT:)

THE COURT: All right, Ladies and Gentlemen, it's taken longer to get started than I thought, but I think you'll find that it always takes Judges longer to do things than they think they can. If you'll stand and raise your right hands, there's a third oath I need to give you.

JURORS SWORN

THE COURT: All right, let me mention a couple of things. The microphones in here do not amplify. If you

(Page 524, Original Transcript)

-- anything said by anyone other than the Defendant in this case.

THE COURT: That's probably a wise thing.

(WHEREUPON, MR. TAYLOR CONTINUED WITH OPENING STATEMENT, AND THE FOLLOWING MOTION WAS MADE DURING THE COURSE OF THE OPENING STATEMENT, TO-WIT:)

MR. TAYLOR: ...The Cocaine was found in a box with the Defendant's name and address on it. At that point, the Defendant was placed under arrest for Trafficking in Cocaine. He was taken to the Whitfield County Correctional Center and Mickey Little, Trooper Mickey Little, along with Ricky Swiney and a Federal Agent spoke to the Defendant, advised him that he had certain Constitutional Rights, Miranda Rights, as I'm sure all of you have heard them referred to: The right to remain silent; the right not to say anything; if you do, it can be used against you in Court; the right to an

attorney. And, the Defendant understood those rights; in fact, he invoked his right to an attorney. He said, "I'd like to talk to an attorney."

(Page 525, Original Transcript)

At that time --

MR. RITCHIE: May we approach the Bench a moment, Your Honor?

THE COURT: All right.

(WHEREUPON, THE FOLLOWING WAS CONDUCTED AT THE BENCH, OUT OF THE HEARING OF THE JURORS, TO-WIT:)

MR. RITCHIE: Your Honor, at this point the Defendant moves for a Mistrial in this case. This Jury has the indication that the Defendant was seeking his right to counsel. That is -- it's -- it is an error which cannot be cured. At this point, the Defendant, therefore, would move for a Mistrial.

THE COURT: What do you say?

MR. TAYLOR: Your Honor, the voluntariness of any statement and whether a statement was made after the Defendant invoked his right to an attorney, and thereafter waived that right, would be an issue for the Jury and the Jury, therefore, must know about it in determining whether that statement was made pursuant to -- voluntarily

(Page 526, Original Transcript)

after invoking that right.

THE COURT: Well, I think he's right. I think I've got a Charge on it.

MR. RITCHIE: Well, Your Honor, of course it's my position that, after the Court hearing the Jackson vs. Denno Hearing that goes to the voluntariness, that it may be, from a factual standpoint, an indication of the -- the indication of the Sixth Amendment Right

(sic) is not anything which can be brought to the attention of the Jury; and it taints the proceedings once that's done. There was no question it was a statement by the Prosecutor. I can get those specific cases, Your Honor.

THE COURT: Well, I can give you a specific case: the case of Edwards vs. Arizona, 69 Lawyer's Ed. 2d 984, 1981. I overrule your Motion. Proceed.

(WHEREUPON, MR. TAYLOR CONTINUED WITH OPENING STATEMENT FOR THE HEARING OF THE JURORS, TO-WIT:)

MR. TAYLOR: After Carl Williams, in the interview room at the Whitfield County

(Page 565, Original Transcript)

make any statements to you or Ricky Swiney?

A. Yes sir.

Q. Okay, what was that about?

A. When Detective Swiney started to leave the room, Mr. Williams made the statement that he thought it was -- money was in the box and not Cocaine. Detective Swiney made a statement to him and eventually walked out. When Detective Swiney had left the room, Mr. Williams asked myself and Agent Sturdivan if we watched the T.V. program Miami Vice; I told him, yes, that I watched the program as often as I could. And then Mr. Williams stated that the things that go on in Miami Vice happen in -- in real life, and that he worked for Columbians and Cubans and that they would kill his family.

Q. Okay, Trooper Little after -- back to the beginning of the conversation between Ricky Swiney and the Defendant, after the Defendant was advised that he had certain Constitutional Rights, one of them being a right to a lawyer, did he exercise any of those rights?

A. Yes sir, he did request a lawyer be present.

Q. Okay, at that time, what action --

MR. RITCHIE: May it please the Court, the same objection and same Motion.

THE COURT: All right, I'll note it for the record as a continuing objection.

MR. RITCHIE: Thank you, sir.

(Page 566, Original Transcript)

Q. After the Defendant stated that he would like a lawyer, what action did you, Wayne Sturdivan, and Ricky Swiney take?

A. At that point, we just prepared to leave, leave the interview room.

Q. Did you, Ricky Swiney, or Agent Sturdivan at any time ask the Defendant any questions after he exercised his right at an attorney?

A. No sir, not to my recollection; no sir.

Q. All right, these statements that you have told the Jury about, these facts that he thought it was money not Cocaine, his being a courier, and the part about Miami Vice, was that in response to any question by you, Agent Sturdivan, or Ricky Swiney?

A. No sir.

Q. Did you, or anyone that was present in that room, at any time threaten the Defendant as far as bodily harm, if he did not talk to you?

A. No sir.

Q. Did you make him any promises about what would be done in the event he did make a statement to you?

A. No sir, no promises.

Q. Did you give him any hope of benefit, or give him anything to look forward to, to encourage him to make a statement to you?

(Page 567, Original Transcript)

A. No sir.

Q. Was Ricky Swiney present during the entire time that these statements were made?

A. I don't believe he -- he was already outside of the door when the Miami Vice question came up.

Q. Okay.

A. He was there for the first one.

Q. All right, if you would, let's just go back through and clarify exactly the order that the way things happened. After the Defendant's Miranda Rights were given to him, what did you and Ricky Swiney and Agent Sturdivan do?

A. When Mr. Williams invoked his right to -- or, wanted a lawyer before he said anything, at that point Detective Swiney started closing up his book and he stood up to leave is when Mr. Williams made the statement about the thinking it was money in the box. I don't recall the verbatim conversation, but Detective Swiney advised him at some point in there that when he talked to a lawyer, if he wanted to talk to us to get in touch with us. At that point, Detective Swiney went outside the door, and then myself and Agent Sturdivan were getting up and ready to leave and the Miami Vice statement was made.

Q. Okay. Now, as far as the items which you recovered out of the Dodge Caravan on the morning of October the 22nd, what did you do with those items?

(Page 581, Original Transcript)

MARCH 20, 1987

THE COURT: Anything else we need to take up in Carl Williams's case before I bring the Jury in?

MR. RITCHIE: Yes, Your Honor.

THE COURT: All right, there is.

MR. RITCHIE: May it please the Court, comes the Defendant and renews his Motion for Mistrial based upon the incident yesterday in which Mr. Taylor

brought out in his Opening Statement, over objection of counsel, the statement that Mr. Williams was advised of his Constitutional Right to remain silent, warning, that he -- correct me if I'm wrong, Lee -- but, that he declined to sign the form, refused to sign the form, and asked for an attorney; that thereafter -- thereby invoking his right to silence. Thereafter, that he made three spontaneous questions -- statements, and those were stated to the Jury. Subsequently, when Mr. --

(Page 582, Original Transcript)

Trooper Mickey Little was on the stand, Mr. Taylor, again over objection, asked Mr. Little if Mr. Williams was advised of his Constitutional Right to remain silent under the Miranda case, was told that he was, and Mr. Taylor elicited from the witness that Mr. Williams had, in fact, declined to respond further by asking for the services of an attorney; but that he thereafter spontaneously made three statements. Implicit in the Opening Statement and in the interrogation of the witness is the Defendant's right to remain silent, his invocation of that right, thereby prohibiting the officers from interrogating him any further, or beyond his three non-elicited statements. It brings before the Jury the idea, one, that he would not be interrogated by the officers or respond to their questions; it brings before them that he has asked for the services of an attorney, both of which carry with it the inference of guilt. It has been so held by numerous cases as being a Constitutional error and impermissible.

(Page 583, Original Transcript)

I would cite the Court the case of United States vs. Everett A. Williams, a case at 536 F. 2d. 65, 1977 case, in which the Court there stated -- well, let me lay the factual background of the case, if I may, first.

THE COURT: Well, wait a minute. I have a Charge from the Charge Book Committee in the Superior Court Judges' Charge Book that cites Edwards v. Arizona, 69 Lawyer's Ed. 2d 984, 1981 case, for authority for the Charge which goes: "Now, once the Defendant exercises any of these rights" -- in Georgia we've been submitting -- we have a Jackson v. Denno Hearing for the Judge to determine voluntariness, but you also submit voluntariness to the Jury in Georgia, or at least most of the Judges I know have been. You advise them of what they're supposed to do, and then the Charge goes: "Now, once the Defendant exercises any of these rights, such as request an attorney, the police cannot question the Defendant any further without an attorney being present, unless the Defendant himself freely and voluntarily requests or initiates further

(Page 584, Original Transcript)

conversations with the police without an attorney being present. If the police initiated any conversation..." and it goes on and on about telling the Jury which way. But, the significant portion of this Charge so far is the first sentence: "Now, once the Defendant exercises any of these rights, such as requesting an attorney..." That is what we have here. I mean, the example they've given me to use in the Charge is precisely what we have here.

MR. RITCHIE: Exactly, Your Honor, except that Edwards vs. Arizona did not involve the prosecutor eliciting this. It involved the admission of the statement -- statement made, as I understand it, without a valid waiver of those rights. What I think we have here, and the difference between what the Court is indicating is, that the Court can Charge that under this pattern instruction in talking about the Defendant's -- the Defendant's failure to make a statement, or his failure to take the stand and testify,

(Page 585, Original Transcript)

that they cannot consider that. Even the Georgia cases, however -- both the Federal cases we're going to mention to the Court and the other cases that apparently there's no dispute about the Law and the Georgia cases say that this cannot be done. It can't be done by the Prosecutor. It is a comment by the Prosecutor, in effect, upon his exercise of his Fifth Amendment Right to silence. The -- I suppose if a Defendant asks for that Charge, I think that is a totally separate issue. If we get to that point, we very well may want to object to that Charge. But, I suggest to the Court that that's a totally separate issue. Let me point out what some of these cases say and how that might apply to our situation here. In the Williams case, the Defense -- on appeal the Defense argues "His Constitutional Rights were impaired because a detective, after relating this impeaching testimony, volunteered, 'He then stated that he wanted to talk to a lawyer before he answered any more

(Page 586, Original Transcript)

questions, at which time, I concluded the interview with him.'" In this case, the prosecutor had not brought it out in Opening Statement, did not elicit it from the witness; it was spontaneously -- that statement came out from the witness without a question being asked about it, and there was no reference to it in the Closing Argument by the Prosecutor, and the Judge gave -- stopped the whole proceeding at that point and gave a curative instruction immediately after the testimony that was given. And, the Court said that, "Counsel for the Appellant argues denial of Constitutional Rights under the doctrine of Griffin v. California which precludes comment on the failure of the Defendant to testify or give a statement at the stationhouse. It is also

clear the Fifth Amendment precludes a Prosecutor from eliciting the Defendant's action in hiring an attorney, in view of the tendency of such testimony to serve as a basis for

(Page 587, Original Transcript)

an inference of guilt based upon such an act," citing U.S. vs. Libia. The Court goes on to say, at page 67: "Testimony about the desire or request for a lawyer is impermissible. Such statements can be excised without making the narrative stilted with the effect of avoiding prejudice; (2) or an unfair inference against either party." The Court also says in the preceding paragraph: "The Prosecutor has no right to introduce evidence that the Defendant was silent," citing U.S. v. Hale; Doyle vs. Ohio; and U.S. vs. Wycoff. Hale was the Supreme Court; Doyle was Supreme Court; and Wycoff was 9th Circuit. The -- "If a Defendant makes an admissible statement, the recounting witness may conclude the account in a natural fashion by indicating there was nothing more to say, because a Defendant chose to stop. Otherwise, the Jury may erroneously infer that it was the police who cut the interview short before the Defendant has a full opportunity to give his account.

(Page 588, Original Transcript)

Of course, the Prosecution may not draw attention to the exercise of the right to become silent after speaking some." Now, in effect, that's exactly what we have here. It's exacerbated in this situation because it was a part of the Prosecutor's Opening Statement. I mean, right up front it was cast out before the -- the Jury. And the obvious inference of guilt that comes -- and any -- sometimes those of us who are intimately involved in the Criminal Justice System, we sort of become harden to these things because we're -- we see it everyday and

this sort of thing. But, interviewing lay persons and Jurors and prospective Jurors, I think all of us know that such things as, "I want to see my lawyer," carries with it the infermature (sic), if you will, of guilt. In the Georgia cases -- my friend, Marcus Morris, I think stayed up until about midnight last night and found a number of cases that talked about this kind of problem. One is Deeberry vs. The State, in the April Term -- and I'll

(Page 589, Original Transcript)

be glad to let you-all look at any of these here in just a moment. It says, "Early in the State's case in chief a police officer testified, without objection, the appellant made no statement to the police when he was arrested. Appellant claims this violated his rights under the Fifth Amendment of the United States Constitution. We agree. But, we also find that the Appellant waived his right to complain of this defect." Then in --

MR. MORRIS: Your Honor, that was Judge Coker of Catoosa County on that case.

MR. RITCHIE: Browning vs. The State, is in April Term, 150 Ga. App. 481, 1979 case, an opinion by Judge Quillian -- Quillian, I'm sorry, Judge Quillian (Pronunciation Difference). This was an appeal from a conviction for Theft by Taking. Held: "During the presentation of the State's case, the Prosecution attorney questioned the arresting officer, as follows: 'Did you explain to him his Constitutional Rights? Yes sir, we did. And after that, did you arrest him? Yes sir.

(Page 590, Original Transcript)

Did he make any statement during his -- this time as to why the chickens were in the car?' Answer: 'No. Did he make any statement in your presence at any time during the time he was in your custody?' Answer: 'No.

He neither denied having the chickens or not? No sir.'" The attorney for the Defendant objected and moved for a mistrial. The Judge overruled his objection. The Court of Appeals reversed and held that, "Evidence as to silence on the part of the Defendant at the time of his arrest should have been excluded when objected to. He is entitled to remain silent, and the Prosecution may not use against him the fact that he stood mute." In this case, the Prosecuting attorney elicited the fact the Defendant chose to remain silent; and then argued this fact as a basis for his guilt. That was harmful error, requiring a New Trial. Let me have just a moment.

(Page 591, Original Transcript)

THE COURT: Well, I tell you what: Why don't I just take it under advisement? You've got your authority Xeroxed there. I'll look at it while we're taking up the next witness.

MR. RITCHIE: Okay, sir. Here's the Williams decision.

THE COURT: All right, anything else before I bring the Jury back?

MR. RITCHIE: No, Your Honor, not --

THE COURT: Bring the Jury on.

MR. RITCHIE: Your Honor, maybe we ought to mention one thing, if you don't mind, because this came up last night, about Robbie Brothers. Let me give the Court the background, as I understand it, on Mr. Brothers's absence, because I feel somewhat responsible if the role that I played caused Mr. Brothers any difficulty. When the Court indicated that we were going to start Thursday instead of Friday, I went to the phone and called Carl Williams and told him he had to be up here that night,

(Page 672, Original Transcript)

to the carbons, hydrogens, oxygens, and so forth, associated with the substance, yes.

Q. All right, sir. Whereas, on the "I/R" there's a certain limited number of bands upon which the little squiggly lines can go, isn't there?

A. Correct.

MR. RITCHIE: No further questions.

MR. PARTAIN: We have nothing further from this witness. May he be excused, Your Honor?

THE COURT: Can he go on about his business?

MR. RITCHIE: Yes, Your Honor.

THE COURT: All right, you can go on about your business. Call your next witness.

MR. PARTAIN: May we approach the Bench, Your Honor?

THE COURT: All right.

(WHEREUPON, COUNSEL APPROACH BENCH AND THE FOLLOWING WAS CONDUCTED OUT OF THE HEARING OF THE JURORS, TO-WIT:)

MR. TAYLOR: Now, Ricky Swiney is going to be the next witness in the case, and I intend to produce "State's Exhibit No. 4" from the

(Page 673, Original Transcript)

Jackson/Denno Hearing. It's indicated on here that the Defendant refused--and requested an attorney--refused to sign the form. Shall we excise that before we tender it at this point, or should we go ahead and proceed as is?

MR. RITCHIE: We would certainly let the record reflect our continuing objection and our renewed Motion if they do it.

THE COURT: Well, let me just put it on the record. I'll let you renew your Motion for Mistrial. The voluntariness was contested at the Jackson/Denno Hearing and there is no indication in the record that it is not contested at the trial. All the facts surrounding

the waiver of the rights are to go -- be for the Jury's consideration when it's contested. And, no Motion in Limine is -- I will Charge, if I Charge the Jury, that it is to be considered only as to voluntariness of the confession and not any other evidence in the case.

(Page 674, Original Transcript)

MR. RITCHIE: May it please the Court, in the Jackson vs. Denno Hearing, counsel for the Defendant cross-examined the officer who was called to testify upon direct. At no time did we, at that point, contest the voluntariness of the statements made by the Defendant in this case. Certainly, and before this Jury, we have not, and do not take the position--have not, from the beginning, taken the position--that Mr. -- that the statements made by him were not voluntary. Furthermore, this was brought up in Opening Statement before we ever had a chance --

THE COURT: Now, wait a minute. The whole reason we have a Jackson/Denno Hearing is so the Court can rule on voluntariness.

MR. RITCHIE: I did not bring it up.

THE COURT: I mean, or there's no reason for the hearing.

MR. RITCHIE: Well, Your Honor, I did not ask for the hearing. The State brought that up and put this on. They did

(Page 675, Original Transcript)

not have a Jackson vs. Denno --

THE COURT: Well, you participated in it.

MR. RITCHIE: Once they put a witness in.

THE COURT: That's the only reason to have a Jackson/Denno.

MR. RITCHIE: Your Honor, I understand. All I'm saying is that we did not ask for the hearing; we did not raise an issue of the voluntariness of the statements; we do not now; we have not throughout the trial. This matter of --

THE COURT: Well, I find otherwise.

MR. RITCHIE: Very well, Your Honor.

THE COURT: I mean, that's what they're all about.

MR. RITCHIE: We asked questions to simply find out if there was a basis to contest. But, once we got the responses we did, then we did not argue that it was not voluntary. Further,

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for the record, may it please the Court, the matter of the comment upon the exercise of Mr. Williams's rights under the Fifth Amendment and the Miranda decision, the Fifth and Fourteenth Amendments, was made by the Prosecutor in Opening Statement. We immediately objected thereafter, and in spite of our objection, the Prosecutor went into the matter on the direct examination of Mickey Little. We again objected and moved for a Mistrial. We re-new that Motion at this time and state for the record that we --

THE COURT: Wait a minute; let me just take something up.

(WHEREUPON, THE FOLLOWING INSTRUCTIONS FROM COURT TO JURORS)

THE COURT: Let me just ask the Jury to step to the Jury Room a minute. It's going to take me a second to sort something out.

(WHEREUPON, JURY LEAVES COURTROOM)

MR. RITCHIE: Shall I continue, Your Honor?

THE COURT: Yeah, go ahead.

(Page 677, Original Transcript)

MR. RITCHIE: May it please the Court, as I was saying at the Bench and before the Jury was excused, if I may, it has never been the position of the Defendant in this case that the statements made by Mr. Williams were other than voluntary. We asked questions at the time that the State called Mickey Little, and that the State initiated a Jackson v. Denno Hearing. Merely in order to protect the interest of the Defendant to determine whether or not there was any basis to take that position, it was our feeling at the conclusion of that interrogation, or examination and cross-examination of Mr. Little, and I believe Detective Swiney, that there was not a valid basis upon which we could take the position that the statements actually made by Carl Williams were other than voluntary; and we certainly have not, in the course of the trial after the empanellment of the Jury and the beginning of taking of evidence by the Court in the presence of the Jury to determine the guilt or innocence of

(Page 678, Original Transcript)

Carl Williams, we certainly have not taken the position that those statements were other than voluntary. But, in the Opening Statement by the Prosecutor, before there was ever any taking of evidence or the statement of a position and trial on the merits of the Defendant as to the voluntariness, or lack thereof, Mr. Taylor, in his Opening Statement, told the Jury that Mr. Carl Williams had been advised of his rights under the Miranda --

THE COURT: You don't have to go back through that.

MR. RITCHIE: Okay. And that he refused to be -- asked for an attorney and refused to make any further statement other than he volunteered three

further statement other than he volunteered three statements that have been introduced. Okay, now, we objected at that time and moved for a Mistrial. The Court denied our Motion. Since that time, obviously Lee has -- Mr. Taylor has elicited the same information on the direct examination of Mickey Little. Again, I objected and I have moved for a Mistrial. We do not take the position,

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and have not taken the position in the trial of this case, that these statements are other than voluntary. So, we have not, we respectfully suggest, before this Jury, opened any door for that kind of testimony to come in, or comments to be made thereby in the Opening Statements made by Mr. Taylor. We would not only suggest to the Court that it is -- that error has been committed, but that the passage of time since the commission of that error means that any attempt at a curative instruction at this point would not likely be effective. And on that basis, we would again move for a mistrial. We would again state our objection for the record. For the record, for the future -- for what's about to happen now, I suggest to the Court further that if the State desires to put in this evidence through Ricky Swiney, Captain Swiney, that Mr. Williams refused to sign a Waiver of his Rights, that that is in direct -- that, too, is Constitutionally impermissible and must not be permitted. It's so held

(Page 680, Original Transcript)

in United States vs. Bridwell, B-R-I-D-W-E-L-L (spelling), a case reported at 583 F. 2d. 1135, decided in the 10th Circuit in 1978. We would also, for the record, object to the Court charging the Jury on the voluntariness of the statements made by Mr. Williams

on the basis that that would produce a further comment upon his exercise of his Constitutional Rights when the Defendant is not maintaining now, or before this Jury, that those statements were not voluntary.

THE COURT: I find, and the Court believes, that you were contesting the voluntariness of the statements by your participation in the Jackson/Denno Hearing, that no time prior to my ruling did you indicate that you thought it was voluntary, that I had to rule on the matter. I find that the State's under the same belief and proceeded accordingly in the Opening Statement. Proceeding in that manner, I find no error. I find no fault on the State's part for addressing that, because that's what we do is submit the voluntariness of the confession to the

(Page 681, Original Transcript)

Jury, and commented on that specifically. I don't remember exactly the way the argument was specifically, but I think he outlined his facts that he expected to prove. Now, in the middle of this trial I have a statement by the Defense lawyer that you-all now concede that it was a voluntary statement. So, that brings up the matter of whether, at this point, I can now remove from the Jury's consideration the issue of the statement, and you now want to object to the Court even submitting that issue to the Jury in charging on voluntariness of the confession; that's what I understand. Is that right, Mr. Ritchie?

MR. RITCHIE: That's right, Your Honor.

THE COURT: So, you, at this time, stipulate and state to the Court that -- I mean, it's the Defendant's position that it was voluntary?

MR. RITCHIE: I have no legal basis, legal or factual basis, to take the position that -- contrary, from the testimony

(Page 682, Original Testimony)

as I heard it in the Jackson vs. Denno Hearing--that after he had asked for an attorney they stopped asking him questions. When they stopped -- and he then volunteered certain other things. I did not argue at the time of the Jackson vs. Denno Hearing that I had a factual or legal basis to take the contrary position. All I recall doing at the time was asking questions of the witness who was on the stand in order to determine whether or not I had a factual or legal basis to take that position. Having concluded that I did not, then I did not take that position, to the best of my recollection, Your Honor. We've slept since yesterday, or at least a little bit last night. But, to the best of my recollection, I did not. In any event, I certainly have not made such a statement at any point before the Jury, and do not, and will not, and will object to anybody else doing so, and, with all due respect, including the Court in its Charge.

THE COURT: Well, what does the State say? Well, at this point I guess I

(Page 683, Original Transcript)

have two avenues to go after: Just keep going and submit the voluntariness to the Jury and let you put in all the facts surrounding the statement given that you want to put in; or, rule that it's not an issue for the Jury and it's irrelevant to bring up even the fact that he was given his rights, since they don't contest the voluntariness of the confession, and let you just go into the statement.

MR. TAYLOR: Either way would be fine with us, Your Honor. I --

THE COURT: Well, I know either way would be fine. Whichever -- which way do you think would be the best way?

MR. TAYLOR: The second way that you mentioned, just going ahead and just proceeding without regard to Miranda Rights, etcetera, would probably be the simplest way; I mean, it would be the best way for that reason.

THE COURT: Well, if I change horses in the middle of the stream, where am I about your Opening Statement?

(Page 684, Original Transcript)

MR. TAYLOR: I'm sorry, I did not hear the last--

THE COURT: Where am I in your Opening Statement, then, if I change horses in the middle of the stream?

MR. TAYLOR: Well, Your Honor, there --

THE COURT: Do I give any curative instruction, or --

MR. TAYLOR: Your Honor, the State's position is that no error has been committed at this point. So, it really -- as far as the Court of Appeals, where any error is concerned, it would not matter. For consistency sake in proceeding and presenting the case in an orderly fashion to the Juror -- Jury, it would probably be more straightforward to proceed without changing horses, as the Court has indicated. Just for the record, the cases, from what I have been able to determine, that Mr. Ritchie has cited to the Court are all --

THE COURT: Well, let's not get into that right now.

MR. TAYLOR: All right.

(Page 685, Original Transcript)

THE COURT: With the exception of one case, there was no confession. All the cases that I have up here that he's handed me were put into evidence that he exercised his rights and there were no confessions, you

know, and under no circumstances were put in. The exception is one where he made a statement, and then exercised his rights and was put in. It's kind of like the reverse situation I've got here. I'm trying to figure out which -- switching horses. Of course, if I continue to go like I am and leave it a Jury issue, give them the Charge, I can't see any prejudice to the Defendant.

MR. RITCHIE: I see a lot, Your Honor.

THE COURT: What? How can the Defendant be prejudiced by me letting the Jury decide on the voluntariness of the statement when you-all are willing to stipulate to the voluntariness?

MR. RITCHIE: Because Your Honor, it brings -- it amounts to a comment, both by the State, or the State's witnesses,

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and ultimately, in all due respect, by the Court upon the silence of the -- the partial silence, if you will, of the Defendant. Implicit in the demand for an attorney, and refusing to participate in interrogation is the -- as far as the Jury -- as far as the Jury is concerned, it would indicate the consciousness of guilt on the part of the Defendant asking for an attorney and refusing to respond to questions by the officers. And, if the Court continues to permit the State to do that and it, in fact, comments on such matter in the Jury instructions, then that simply exacerbates the prejudice already sustained.

THE COURT: Well, you may -- arguing the same thing. I had a Motion yesterday where there was no indication out of you that you thought it was voluntary, and a Motion for Mistrial; you re-urged it this morning and never indicated that. And, now, here we are all the way down in the middle of the State's case and you want me to switch horses.

MR. RITCHIE: I'm not asking -- I'm asking the Court not to let the State

(Page 687, Original Transcript)

do what they've been doing, and I'm asking the Court not to do it. But, I wouldn't call it switching horses. I mean, I think that -- I think the bell has done been rung and it cannot be unrung at this stage, short of mistrial, I believe.

THE COURT: The bell has been rung because everybody believed that you were contesting the voluntariness of the confession. Now you've informed the Court that you're not.

MR. RITCHIE: Let me point out, in all due respect to the Court, I didn't file a Motion to Suppress the statement at all. I filed a Motion to Suppress the physical evidence. I did not raise an issue as to the voluntariness of the confession pre-trial, or trial. I did not initiate the Jackson vs. Denno Hearing; that was initiated by the State. I did not raise that issue then, or earlier. I haven't raised it since. They put Mickey Little and Rickey Swiney on the stand and brought up the subject. I then asked questions merely to see, since they brought it up, if there was some area that I should address as counsel for Carl Williams.

(Page 688, Original Transcript)

I found none. So, I don't think that I have misled the Court or counsel.

THE COURT: yes sir, I -- I'm not going to allow you to sit back and participate in a hearing where I have to make a ruling and we proceed under the belief that you're contesting it, and then you say -- get down in the thing and let everybody fall in some kind of trap and say, "Oh, we weren't contesting it." I won't allow you to participate in that way.

MR. RITCHIE: With all due respect, Your Honor, I certainly haven't tried to make a trap for anybody, the Court or counsel. I don't practice Law that way, and I think the Court --

THE COURT: Well, it may not have started out as a trap, but I think you're certainly trying to take advantage of that.

MR. RITCHIE: I'm simply trying to, I think, stop the further prejudice to Mr. Williams and effectively represent him and assist the Court in trying to get a

(Page 689, Original Transcript)

fair trial for him.

THE COURT: Bring the Jury back in and we'll go to lunch before we start the next witness. We're taking up too much time with this.

MR. PARTAIN: Your Honor, the State would tender at this time, "State's Exhibits 7, 8, 9, 10, 11, 11-B, 12, 13, and 14".

MR. RITCHIE: Your Honor, we would object, and like to argue that in more time than we've got --

THE COURT: We'll let's go to lunch, and then we'll take it up.

(WHEREUPON, JURY ENTERS COURTROOM)

THE COURT: All right, I'm just going to stop now and let you go to lunch. I'm going to retain the attorneys; there's still another matter we need to take up, but I thought I'd just call you back and let you go on to lunch now. Be back in the Jury Room at 1:00 o'clock. Now, you can disperse for lunch; if two or three of you want

(Page 699, Original Transcript)

THE COURT: All right.

(RECESS - 12:10 - 1:10, P.M.)

THE COURT: All right, let's discuss your next witness a little further before he comes into Court, the discussion we were having right before lunch. Your question was -- the State's question is something about a form.

MR. TAYLOR: Yes sir.

THE COURT: Whether it ought to be put in evidence. The testimony that ought to be elicited is really what it evolved into. But, what was your question originally about the form?

MR. TAYLOR: My question was whether or not the form should be put into evidence with or without the writing on there that states, "Refused - Requested Attorney," under the line which is for signature.

THE COURT: All right.

MR. RITCHIE: May it please the Court, we would object, as we have before, to the form going in at all. There's

(Page 700, Original Transcript)

no way to redact, or otherwise, just by knocking that out. Obviously there's no signature on it; the obvious inference being that he didn't sign it, he declined or refused to sign it.

THE COURT: Well, do you expect your evidence to be that that particular form was used by the officer to read his rights?

MR. TAYLOR: Yes sir.

THE COURT: I'm going to allow it into evidence at this point in time. My intention is to submit to the Jury the issue of voluntariness of the confession. For the record, I'd like to put two citations in the record: Dunn vs. The State, 145 App. 612, headnote (4), which is pretty close on all fours, them bringing up an individual exercising his Constitutional Rights and

the officer commenting on it when he testified as to what he told in a prior conversation and why it ended. The interesting case is really not on point, but it's right -- very interesting is: Overcash vs. The State, 239 Ga. 499.

(Page 701, Original Transcript)

MR. RITCHIE: Could I have that cite again, please, Your Honor?

THE COURT: Overcash is 239 Ga. 499.

MR. RITCHIE: And the prior?

THE COURT: Dunn vs. The State, 145 Ga. App. 612, headnote (4).

MR. RITCHIE: 612?

THE COURT: Page 612, headnote (4).

MR. RITCHIE: Thank you, Your Honor.

THE COURT: Overcash really isn't on point, but it's very interesting in this connection; but, Dunn is real close to being on point as to what the officer could say about having a conversation transpire. (Pause) All right, anything else before I bring the Jury in?

MR. TAYLOR: Your Honor, there is the matter that Mr. Morris --

THE COURT: Well, is he here?

MR. TAYLOR: No sir, he's not.

THE COURT: Well, we don't need to take it up, then. Let's bring the Jury on.

(Page 702, Original Transcript)

MR. RITCHIE: Your Honor, we will present to the Court, and a copy to counsel, certain Requests to Charge that you can look at now, or look at it at the Court's convenience. (Pause) Your Honor, can we just have a continuing objection, without having to bob up and down?

THE COURT: Yes sir.

MR. RITCHIE: A continuing objection to the proffered testimony?

THE COURT: Yes sir.

MR. TAYLOR: Call Ricky Swiney.

Whereupon,
RICKY SWINEY
after having first been duly sworn,
testified as follows:

DIRECT EXAMINATION: MR. TAYLOR

Q. Okay, sir, state your name and occupation?

A. Ricky Swiney, Whitfield County Sheriff's Department.

Q. And in what capacity are you employed at the Whitfield County Sheriff's Department?

(Page 705, Original Transcript)

got into the interview room?

A. I introduced myself to him and introduced Agent Sturdivan to him. I then advised him of his Miranda Rights.

Q. Okay, now, Capt. Swiney, who was actually conducting the interview? There were three of you in there other than the Defendant. Who was doing the talking?

A. I was.

Q. What were Trooper Little and Agent Sturdivan doing?

A. Sitting there listening.

Q. Okay. Let me show you what has been marked for identification as "State's Exhibit No. 4". Do you recognize that, sir?

MR. RITCHIE: If it please the Court, for the record--I realize we have a continuing objection--but, we would state for the record at this time our objection to the line of questioning upon which the Prosecution

started to embark and the introduction of that testimony and the form which is so marked as "State's Exhibit", what, "4".

THE COURT: Okay, I'll agree to make that a continuing objection.

(Page 706, Original Transcript)

MR. RITCHIE: Thank you, sir.

Q. Do you recognize that exhibit, sir?

A. Yes sir.

Q. What is it? —

A. It's a standard Miranda Rights form.

Q. And is it dated?

A. Yes sir, it is.

Q. And is it signed?

A. Signed by myself.

Q. And what is the date on the form?

A. 10/22/86.

Q. Is this the form which you used in your discussion with the Defendant on the morning of October the 22nd?

A. Yes sir.

MR. TAYLOR: The State would tender its "Exhibit 4" at this time.

THE COURT: It's admitted.

Q. Okay, Capt. Swiney, you say you went over this form with Carl Williams?

A. Yes sir.

Q. Did you read the form to him?

A. Yes sir, I did.

Q. Did he seem to comprehend what it was that you were telling him?

(Page 707, Original Transcript)

A. Yes.

Q. Would you read the form, please, for the Jury?

A. "Statement of Miranda Rights - You have the right to remain silent. Anything you say can and will be used against you in a Court of Law. You have the right to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. WAIVER OF RIGHTS - I have read the above statement of my rights and understand each of those rights; and having these rights in mind, I waive them and willingly make a statement."

Q. Okay, you say after going through this the Defendant acknowledged that he understood what you had just gone over?

A. Yes sir.

Q. Did he seem to be under the influence of any intoxicants or -- such as drugs or alcohol, which would keep him from understanding what you just --

A. No sir, he wasn't.

Q. There's a portion of that form which is for a signature; is that correct?

(Page 708, Original Transcript)

A. Yes sir.

Q. Did the Defendant sign the form?

A. No sir.

Q. Okay, what was the next thing that happened as far as your conversation is concerned?

A. Well, after I read him his Miranda Rights I asked him did he understand them, and he said he did. I asked him was there anything on the form that he did not understand, and he said that, no, there wasn't. I

asked him if he would like to sign and talk to us about this; at which time, he requested an attorney.

Q. Okay, now, during the course -- well, let me ask you this: In your experience as a law enforcement officer, what happens when a person requests an attorney?

A. We terminate the interview.

Q. Okay, what happened in this case?

A. I terminated the interview and started to get up and leave.

Q. And was there any further questioning by you?

A. No sir.

Q. Was there any further questioning by Trooper Little or Agent Sturdivan?

A. No sir.

Q. Was there any further remark from the

(Page 709, Original Transcript)

Defendant?

A. Yes sir.

Q. What is that?

A. He first asked me would the Court appoint him an attorney; and I said, "Well, that's up to the Judge. In the next day or two you'll be taken before the Court. It's up to the Judge whether an attorney is appointed or not." I then turned to walk out of the room. He said, "I didn't know it was Cocaine in the box." I turned around and faced him and he said, "I figured it was money." He said, "I'm just a courier and I was going to make some money." At that time, I told him, I said, "After you talk with an attorney, if you want to talk with us notify a Booking officer and we'll talk with you." He then made a statement, "The other boy didn't know anything about it. He was just helping drive." He then said he was going to get his mother, that she didn't like to fly. I then, at that time, told him

again if, after he talked with an attorney, if he wanted to talk with us to get in touch with us. I then left the room.

Q. Okay, where were Agent Sturdivan and Trooper Little during this period of time?

A. They were still in the interview room.

Q. And where were they when you left the room?

(Page 710, Original Transcript)

A. Still in the interview room.

Q. Okay, were they still seated?

A. They had got up to leave and they had sat back down when he started making these statements.

Q. Okay. Do you recall hearing any other remarks by the Defendant that morning?

A. No sir, I left the room.

Q. Okay. So, Trooper Little and Agent Sturdivan were still in the room as you left?

A. Yes sir.

Q. Did you promise Carl Williams anything at all with regard to his statements?

MR. RITCHIE: Your Honor, I'm going to object on the basis of relevancy. We have not raised the issue of voluntariness of the statement.

THE COURT: All right, your objection is noted. Go ahead, Mr. Taylor.

Q. Answer the question, please sir, Capt. Swiney.

A. No sir, he was promised nothing.

Q. Did you give him any hope of benefit, or offer a reward to him for making any statements, Capt. Swiney?

A. No sir.

(Page 711, Original Transcript)

Q. Was there any threat of bodily harm, as far as what would happen if he did not make a statement?

A. No.

Q. Did he freely and spontaneously remark these statements which you have just told the Jury about?

A. Yes, he did.

MR. TAYLOR: That's all, Your Honor.

CROSS-EXAMINATION: MR. RITCHIE

Q. Capt. Swiney, you were advised -- you were advised, were you not, that after you left the room that he expressed some concern for Betsy, his wife, and his family and what might happen to them?

A. No.

Q. You've not been told that, that after you left the room -- Mickey Little was in the room, was he not? Mickey Little was left in the room, wasn't he?

A. Yes sir.

Q. And Mr. Sturdivan?

A. Yes sir.

Q. And you've talked to them, haven't you?

A. Yes sir.

Q. And they've told you that he expressed concern for his family and what might happen to them

(Page 721, Original Transcript)

THE COURT: You have informed me that you are not going to present any evidence?

MR. RITCHIE: Yes sir. Let me -- let me again, out of an abundance of caution, move this Court for a mistrial on the basis of the -- move the Court for an order directing a mistrial in this case on the grounds as previously stated, the comments by counsel on the silence, partial or otherwise, of the accused. I know

we've said we've got a continuing objection, but I'd just feel a little more comfortable with another Motion for Mistrial.

THE COURT: Okay, I'll continue to overrule your Motion. Anything else we need to take up?

MR. RITCHIE: Yeah, one other thing, if I can, and this may not be the time to bring it up because it's more directed to the Motion to Suppress Hearing than to the merits of the case, but the Court will recall we talked about including the testimony of Jimmy Howell in the Williams's record after

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JURY INSTRUCTIONS

party to negate all possibility of substitution or tampering. The party need only establish that it is reasonably certain that substitution, alteration, or tampering did not occur.

I charge you that a Defendant in a criminal trial is under no duty to present any evidence tending to prove his innocence, and is not required to take the stand and testify in the case. If he elects not to testify, no inference hurtful, harmful, or adverse to the Defendant shall be drawn by the Jury, nor shall such fact be held against him in any way whatever.

Now, an alleged statement by the Defendant has been admitted into evidence. Before you may consider this as evidence for any purpose, you must first decide two questions: First, was the Defendant warned of his Constitutional Rights, and did he clearly understand and knowingly give up such rights; and, secondly, was his statement clearly voluntary and freely and willingly given? The rights which must be explained and which must be understood and given up by the Defendant before any statement is taken by the police are as follows: (a) That he had a right to remain silent; (b)

that if he chose not to remain silent, anything he said could be used

(Page 737, Original Transcript)

as evidence against him in Court; (c) that he had a right to consult a lawyer before questioning and have the lawyer present with him at all times during any questioning; and (d) that if he did not have money for a lawyer, a lawyer would be provided for him to represent him before any questioning and to be present with him during any questioning.

Now, once the Defendant exercises any of these rights, such as the requesting of an attorney, the police cannot question the Defendant any further without the attorney being present, unless the Defendant himself freely and voluntarily requests and initiates further conversation with the police without an attorney being present. Now, if the police initiated or continued a conversation with the Defendant after the Defendant exercises such rights, then any statement made to the police by the Defendant after he exercises such right would not be voluntary; and you wold disregard the same entirely and completely in reaching your verdict in the case if you find this to be the facts. On the other hand, if the Defendant, solely on his own initiative, after exercising such rights, freely and voluntarily requests and initiates further conversation with the police without an attorney and without a request -- without any request,

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instigation, coercion, duress, fear, or hope of benefit or reward, or other action on the part of the police, then you would be authorized to consider that, provided you find from the evidence and the Court's instructions that

any such conversations or statements was otherwise freely and voluntarily given by the Defendant.

Now, to be voluntary, a statement must be freely and willingly given, with complete understanding and without coercion, duress, threats, or use of violence, fear of injury, or without any suggestions or promises of leniency or reward. A statement induced by the slightest hope of benefit, or the remotest fear of injury is not voluntary. To be voluntary, a statement must be the product of a free will, and not under compulsion or any necessity imposed by others. The burden is upon the State to prove -- to establish that the warnings of all the rights mentioned were given, that they were clearly understood and knowingly given up by the Defendant and that the statement was voluntary and was freely and willingly made.

Now, if you find that all the warnings of his Constitutional Rights were given, that the Defendant clearly understood the meaning of what was said, knowingly gave up such rights, and if

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you further find the statement was voluntary, then you may consider it as evidence. Now, if so, then apply the general rules for testing the believability of the witnesses and decide what weight, if any, you will give all or any part of such evidence. However, if you fail to find any one of the conditions I've just described, you must disregard the statement entirely and give it no consideration in reaching your verdict.

You should consider with great care and caution the evidence of any statement made by the Defendant. The Jury may believe any statement in whole or part, believing that which they find to be true and rejecting that which they find to be untrue. Upon you alone rests the duty to apply the general rules for testing the

believability of witnesses and decide what weight should be given to all or any part of any such evidence.

Further, I charge you that any exercise of the Constitutional Rights that I've gone over, such as the right to remain silent, or the right to talk with an attorney, is no evidence -- is not to be considered by you as evidence of guilt or innocence, and is not to be used as any kind of inference of guilt. Any such evidence is presented solely for

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determination of voluntariness of any alleged statements and for no other purpose.

I charge you where all the facts and circumstances of the case and all reasonable deductions therefrom present two equal theories, one of guilt and the other of innocence, then the Jury must acquit the accused.

I charge you that facts and circumstances which merely place upon the Defendant a grave suspicion of the crime charged, or which merely raises speculation or conjecture of the Defendant's guilt, are not sufficient to authorize a conviction of the Defendant.

Mere presence of a person at the scene of the commission of a crime at the time of its perpetration, without more, will not of itself authorize a Jury to find the person who was merely present guilty of consent in, or concurrence in the commission of the crime, unless the evidence shows beyond a reasonable doubt that such person committed the alleged crime, or that such person aided and abetted in the actual perpetration of the crime or participation in the criminal endeavor.

Every person concerned in the commission of a crime is a party to it, and may be charged with and convicted of commission of the crime. A person

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EXCEPTIONS

THE COURT: Exceptions by the State?
MR. TAYLOR: None whatsoever, Your Honor.
THE COURT: Exceptions by the Defendant?
MR. RITCHIE: A couple of matters, Your Honor, if I may. Number one, I would state for the record that we would reserve objections to the Charge, in accordance with the procedure under Georgia Law, but would mention two, in specific, that we feel compelled to mention to the Court at this time. One is, we would object to that portion of the Charge dealing with, or discussion of, the advice of the Miranda Warnings to the Defendant and the consideration of that aspect of the matter as constituting a comment by the Court on the silence, or partial silence of the Defendant, or his invocation of his right to counsel and his rights under

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the Miranda decision, the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the applicable State Constitutional provisions that are similar. Second objection we would make is that, Your Honor, the Indictment charges only "knowing and actual possession of twenty-eight (28) grams or more Cocaine." It does not charge that portion of the Statute dealing with bringing into this State twenty-eight (28) or more grams of Cocaine, and the Court did read that portion of the Statute. I am concerned that the Jury might be misled into thinking that they could convict on that basis, even though he was not indicted on that

basis. I'm not, frankly, sure what the remedy is at this point, but we would certainly object to that and ask for a curative instruction from the Court.

THE COURT: All right. I think you're right as to your last exception. Evidently I've looked at another Indictment in the last two or three days where they alleged the whole thing. Okay, I'll see if I can straighten that out. What else?

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RECESS

JURY QUESTION
(JURY RETURNS TO COURTROOM)
4:35 P.M.

THE COURT: All right, I've got a question from the Jury. The question is: "Is there still two choices: one, Trafficking, and, two, simple Possession?" The answer to that question is "Yes". What I've just -- what I cured is the statement made giving you the Trafficking offense. That's the only thing I've changed, just really the definition of Trafficking. Everything else I charged remains the same. And, the options you have on reaching a verdict remain the same. Does that answer your question? You still have: Trafficking, with the lesser-included offense of simple Possession; Count II, Speeding. There is no lesser-included offense for Speeding. Possession of Marijuana, less than an ounce, there is no lesser-included offense for Possession of Marijuana, less than an ounce. All right, if you'll step back to the Jury Room,

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I'll let you continue your deliberation.

JURY RETIRES FOR DELIBERATIONS

THE COURT: All right, we'll be at ease.

RECESS

JURY QUESTION
(JURY RETURNS TO COURTROOM)

THE COURT: All right, I've got a second question. "Explain Trafficking; explain Possession. Can he be found guilty of simple Possession and not Trafficking?" Let me answer your last question first: "Can he be found guilty of simple Possession and not Trafficking?" Yes; the answer to that question is "Yes". All right, "Explain Trafficking."

Under the Georgia Code Section 16-13-31, any person who is knowingly in actual possession of twenty-eight (28) grams or more of Cocaine, or any mixture with a purity of ten percent (10%) or more of Cocaine, as described in

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Schedule II, in violation of this article, commits the felony offense of Trafficking in Cocaine. Do you want me to read that again? (Pause) Let me go over it again. Any person who is knowingly in actual possession of twenty-eight (28) grams or more of Cocaine, or any

mixture with a purity of ten percent (10%) or more of Cocaine, as described in section -- Schedule II, in violation of this article commits the offense of Trafficking in Cocaine.

All right, that's what's charged in Count I. Now, as a lesser-included offense to that is what we call simple Possession. Under Georgia Law, simple Possession is: It's unlawful for any person to possess, or have under his control, Cocaine.

Now, one of the key differences between those Statutes that I gave you the long charge on about is actual possession and constructive. Under Trafficking Cocaine, you must find that he had actual possession, knowingly had actual possession. Under simple Possession, that Statute requires that you find that he did possess Cocaine.

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That can be either actual, or constructive possession, as I defined it. I'll be glad to go through those -- all that -- all that actual and constructive, if you want me to. Do you-all want me to? If you do, I will.

JUROR: Yes sir.

THE COURT: Okay. All right. The Law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is in actual possession of it. A person who, though not in actual possession, knowingly has both the power and the intention at a given time to -- I'm sorry, strike that. A person who, though not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing is then in constructive possession. The Law also recognizes that possession may be sole, or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share possession of a thing, then possession

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is joint. The Jury would be authorized to convict on Trafficking in Cocaine only if they should find beyond a reasonable doubt that the Defendant knowingly had actual possession, either alone or jointly with others. The Jury would be authorized to convict on simple Possession only if they should find beyond a reasonable doubt that the Defendant knowingly had actual or constructive possession, either alone or jointly with others.

I charge you that if you find beyond a reasonable doubt that this Defendant was not in actual physical possession of the controlled substance as alleged in the Bill of Indictment, you would be authorized to consider the lesser-included offense of Possession of Cocaine. If you determine, after a consideration of all the evidence, that Carl Leroy Williams was in constructive possession of the Cocaine, as alleged in Count I -- well, wait a minute. That isn't alleged in Count I.

If you determine, after a consideration of all the evidence, that Carl Leroy Williams

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was in constructive possession of the Cocaine referred to in Count I of the Indictment, you would be authorized to find him guilty of the lesser-included offense of Possession of Cocaine. If you find this Defendant was not in constructive possession of the Cocaine, or actual possession, at the time and place alleged, your duty would then be -- would be to acquit him as to Count I.

Now, I charge you in regard to the lesser-included offense of Possession of Cocaine, wherein the Defendant may have had constructive possession of a controlled substance, that the Law recognizes that, though a person is not in actual possession over a thing,

such person may be in constructive possession. A person who, though not in actual possession, knowingly has both the power and intention at a given time to exercise dominion or control over a thing is then in constructive possession of it. Constructive possession, however, on the part of the Defendant, would not be sufficient to find him guilty of Trafficking in Cocaine, but may be considered by you in determining whether he is guilty

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of the lesser-included offense of Possession--simple Possession--of the contraband substance, that is, Cocaine.

Now, with regard to the lesser-included offense of Possession of Cocaine, I charge you that the Law recognizes two kinds of possession: actual possession and constructive. A person who knowingly has direct physical control over a thing at a given time is in actual possession of it. A person who, though not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing is then in constructive possession of it.

Now, as to actual possession, it is not necessary for the items to be directly on his person. A person who knowingly has direct physical control over a thing at a given time is in actual possession of it.

Anything else? Any portions of those you want me to go over and try to explain another way?

(NO RESPONSE)

THE COURT: All right, you can step back to the Jury Room. If you have

CONSTITUTIONAL PROVISIONS

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger: nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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EXCERPT FROM GEORGIA'S SUPERIOR COURT PATTERN CHARGE BOOK

3. AFTER EXERCISING MIRANDA RIGHTS - DEFENDANT THEN INITIATING FURTHER CONVERSATION

NOW, ONCE THE DEFENDANT EXERCISES ANY OF THESE RIGHTS, SUCH AS REQUESTING AN ATTORNEY, THE POLICE CANNOT QUESTION THE DEFENDANT ANY FURTHER WITHOUT AN ATTORNEY BEING PRESENT, UNLESS THE DEFENDANT, HIMSELF, FREELY AND VOLUNTARILY REQUESTS AND INITIATES FURTHER CONVERSATIONS WITH THE POLICE WITHOUT AN ATTORNEY BEING PRESENT.

IF THE POLICE INITIATE OR CONTINUE CONVERSATION WITH THE DEFENDANT, AFTER THE DEFENDANT EXERCISES SUCH RIGHT, THEN ANY STATEMENT MADE TO THE POLICE BY THE DEFENDANT, AFTER HE EXERCISES SUCH RIGHT, WOULD NOT BE VOLUNTARY, AND YOU MUST DISREGARD SAME ENTIRELY AND COMPLETELY IN REACHING YOUR VERDICT IN THIS CASE, IF YOU FIND THAT TO BE THE CASE.

ON THE OTHER HAND, IF THE DEFENDANT, SOLELY ON HIS OWN INITIATIVE, AFTER EXERCISING SUCH RIGHTS, FREELY AND VOLUNTARILY REQUESTS, AND INITIATES, FURTHER CONVERSATION WITH THE POLICE, WITHOUT AN ATTORNEY, AND WITHOUT ANY REQUEST, INSTIGATION, COERCION, DURESS, FEAR, OR HOPE OF-

BENEFIT OR REWARD, OR OTHER ACTION ON THE PART OF THE POLICE, THEN YOU WOULD BE AUTHORIZED TO CONSIDER SAME, PROVIDED YOU FIND FROM THE EVIDENCE, AND THE COURT'S INSTRUCTIONS, THAT ANY SUCH CONVERSATION OR STATEMENT WAS OTHERWISE FREELY AND VOLUNTARILY GIVEN BY THE DEFENDANT. Edwards v. Arizona, 69 L. Ed. 2d 984 (1981).

STATE EXHIBIT FOUR--CARL WILLIAMS

STATEMENT OF MIRANDA RIGHTS

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to talk to a lawyer and have him present with you while you are being questioned.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.
5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

WAIVER OF RIGHTS

I have read the above statement of my rights and I understand each of those rights, and having these rights in mind I waive them and willingly make a statement.

_____
Refused
Requested Attorney

Witnessed by:

_____
Officer's Name (Signed: Ricky Swiney)

_____
Officer's Department (Signed: Sheriff Dept.)

Date: 10/22/86
Time: 6:39 A.M.